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No. 75-491

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

LINDA AGURS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ANDREW L. FREY,
Deputy Solicitor General,

JOHN F. COONEY,
Assistant to the Solicitor General,

JEROME M. FEIT,
ROBERT H. PLAXICO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 510 F. 2d 1249.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1975, and the government's timely petition for rehearing with a suggestion for rehearing *en banc* was denied on August 6, 1975 (Pet. Apps. B, C, D). On August 28, 1975, Mr. Justice

Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 29, 1975. The petition was filed on that date and was granted on November 17, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, when the defense is aware of the probable existence of certain information and makes no request for its production, and the prosecution believes in good faith that the information is immaterial, the prosecutor's nondisclosure of this information warrants the grant of a new trial.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty or property, without due process of law * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of second-degree murder, in violation of 22 D.C. Code 2403 (1973 ed.), and was sentenced to a term of from five to twenty years' imprisonment. Respondent neither testified nor produced any evidence in her own behalf. Respondent's claim of self-defense was presented solely through cross-examination of

government witnesses and argument of counsel to the jury.

1. On the afternoon of September 24, 1971, decedent James T. Sewell was fatally stabbed in a northwest Washington tourist home. The government introduced evidence tending to show that respondent was a prostitute who had previously used the tourist home in her assignations (App. 86-87). At approximately 4:30 p.m. on the day of his death, Sewell and respondent registered for a room as husband and wife (App. 29, 30). The prosecution's theory of the case was that upon returning unexpectedly from the detached bathroom to their motel room, Sewell had discovered respondent searching through his clothes for money; when he attempted to recover his funds, respondent stabbed him with his Bowie knife, which lay among his clothes. Sewell's estranged wife testified that shortly before his death, Sewell had had $345 in his possession (App. 19). The prosecution also introduced testimony that no money had been found in the motel room, in Sewell's trousers, or in his wallet, which had been ransacked (App. 96).

Additional evidence showed that approximately fifteen minutes after the couple registered, three motel employees overheard screams emanating from their room. Upon forcing open the door, they discovered Sewell and respondent on the bed (App. 32, 33). Respondent had both hands on the handle of the knife, while Sewell had grasped the blade in an apparent effort to protect himself (App. 53). After

they had been separated, Sewell was taken to a local hospital, where he died (App. 62).

The autopsy revealed that Sewell had been stabbed repeatedly in the chest and abdomen (App. 75-76). He had also been slashed about the arms and hands, wounds which the coroner categorized as defensive, suffered in an attempt to ward off blows (App. 76, 77). At the time of respondent's arrest on the following morning, physical examination disclosed no cuts, wounds or bruises on any part of her body (App. 104, 108).

Respondent's attorney argued that the jury could conclude that Sewell had been the aggressor by reference to the presence of a pocket knife in his pants' pocket, his possession of a Bowie knife at the time the couple registered, and the testimony of one witness that, when discovered by motel employees, the decedent lay atop respondent as they struggled for the knife. The jury nonetheless found respondent guilty of second-degree murder after twenty-five minutes' deliberation.

2. During pretrial interviews of potential witnesses, respondent's attorney learned that Sewell might have been previously arrested and convicted on assault charges (App. 159).[1] Her counsel believed that, under the law then governing, the de-

[1] Respondent's counsel admitted (App. 159) that in a pretrial conversation with a witness, "the witness indicated that he had heard that the decedent might have been arrested a number of times and possibly convicted for assaulting various people including a police officer with a knife."

cedent's prior criminal convictions were inadmissible to prove self-defense unless the accused had actual knowledge of the offenses at the time of the homicide. He obtained corroboration of this understanding from a more experienced criminal practitioner (App. 159-160). Accordingly, upon determining that respondent was unaware of Sewell's past acts, defense counsel concluded that further investigation in this area would be pointless (App. 160). Therefore, despite numerous subsequent discussions of the case with the prosecution (App. 146), respondent's attorney neither subpoenaed decedent's criminal record nor requested that the government produce it at trial.[2]

[2] Respondent's Brief in Opposition erroneously contends (Opp. 4-5) that in failing to produce Sewell's criminal record, the government violated its agreement at a discovery hearing to honor defense counsel's request for "whatever information the government had." But the record of that hearing unambiguously demonstrates that the defense made no pretrial request for production of exculpatory information. The transcript shows that respondent's attorney had asked for production of certain physical evidence discoverable under Fed. R. Crim. P. 16(b) (1971 ed.) and that the parties had reached substantial agreement as to its disclosure (App. 10):

> THE COURT: * * * Have you had all of the discovery you want?
>
> [Defense Counsel]: Well, not all, Your Honor, primarily because [the prosecutor] does not have it all in his possession at this time, such as photographs and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.
>
> THE COURT: It has been this Court's experience we have never had a problem in that regard.

[Footnote continued on page 6]

The prosecutor shared defense counsel's belief that, under applicable precedents at the time of trial, the record of decedent's prior convictions was not admissible unless respondent had actual knowledge of those incidents (App. 148). Therefore, no testimony was introduced at trial concerning decedent's past criminal record. Sewell had in fact been convicted in 1963 of simple assault and of carrying a dangerous weapon and in 1971 of carrying a dangerous weapon; the weapon in each instance was a knife (App. 145, 151).

3. Approximately three months after respondent's conviction, the United States Court of Appeals for the District of Columbia Circuit stated in dictum in *United States* v. *Burks*, 470 F. 2d 432, that irrespective of the defendant's knowledge thereof, evidence of the decedent's past violent acts is admissible in a homicide trial in which a claim of self-defense is raised. *Id.* at 434, n. 4.[3] Upon learning of this

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[2] [Continued]

[Defense Counsel]: I have never had any, Your Honor.

THE COURT: If you have any, let me know.

Respondent did not allege that her attorney encountered any difficulty in obtaining discovery of the items that were the subject of this colloquy. Furthermore, the record is devoid of any passage, however generously interpreted, that suggests a defense request for inspection of decedent's criminal record.

[3] The generally accepted rule elsewhere appears to be that evidence of specific violent acts of the decedent involving assaults on persons other than the defendant is not admissible unless known to the defendant or immediately related

decision, respondent's counsel inquired of the prosecution regarding Sewell's criminal record. A search of the prosecution's case file revealed Sewell's past conviction record (App. 162).

Respondent then filed a motion for a new trial on the basis of newly discovered evidence, pursuant to Fed. R. Crim. P. 33. Her attorney argued that in failing to disclose this information *sua sponte*, the government had denied her due process of law. The district court denied the motion, holding that the prosecution's failure to produce this information was not improper because the admission of decedent's record would not have affected the jury's verdict (App. 153-156, 157).[4]

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to the decedent's state of mind at the time of the alleged assault. *Hayes* v. *United States*, 367 F. 2d 216, 223 (C.A. 10); 2 Wigmore, *Evidence* §§ 246, 248 (3d ed. 1940); see Annotation, 1 A.L.R. 3d 571, 601 (1965). Indeed, despite its broad language, the *Burks* holding represented no major extension of this rule, since the defendant there had prior knowledge of the violent act concerning which evidence was excluded.

[4] Respondent's original attorney thereafter withdrew, in order that she might claim on appeal that his failure to pursue Sewell's criminal history had deprived her of the effective assistance of counsel (App. 158-164). Substitute counsel thereafter filed a second motion for a new trial on that ground, which the district court denied after a hearing (App. 188-190). While the court of appeals did not purport to rule on this claim (Pet. App. A, p. 14a), given the minimal probative value of decedent's criminal history, this argument seems to us to be frivolous, even under the liberal standard for assessing such claims followed by the District of Columbia Circuit. See *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.). If the failure to follow up and introduce

4. The court of appeals reversed respondent's conviction and remanded the case for a new trial, holding that the prosecution's failure to disclose the decedent's past criminal record to the defense on its own initiative constituted a denial of due process of law under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. The court conceded that "[n]o clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution's duty to reveal possibly exculpatory information in its possession" (Pet. App. A, p. 9a). The court did not suggest that the prosecution had deliberately suppressed this information or otherwise acted in bad faith (Pet. App. A, p. 8a, n. 9). It found, however, that in determining whether a given instance of prosecutorial nondisclosure violates due process, "[t]he materiality of undisclosed evidence is a much more significant factor than prosecutorial misconduct * * *" (*id.* at p. 10a). In reliance on its previous decision in *Levin* v. *Clark*, 408 F. 2d 1209, the court held that the Due Process Clause requires a new trial whenever the undisclosed evidence, if brought to the jury's attention, "'might have led the jury to entertain a reasonable doubt about [the defendant's] guilt'" (Pet. App. A, p. 11a; see also *id.* at p. 14a, n. 26). The court concluded that the

into evidence one piece of information of marginal probative value and doubtful admissibility constitutes ineffective assistance of counsel, then we think it can safely be ventured that few litigants have ever received "effective" assistance.

undisclosed evidence of Sewell's violent past was sufficiently material to the question of respondent's guilt or innocence that it outweighed the absence of prosecutorial culpability or lack of defense diligence in procuring that information. It therefore remanded the case for a new trial.

5. The government's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals. Four active judges, joined by Senior Judge Danaher, a member of the original panel, filed a statement disagreeing with the panel decision and expressing the belief that the case should have been reheard by the full court (Pet. App. D, pp. 20a-22a).[5]

SUMMARY OF ARGUMENT

In order to prevail upon a motion for a new trial on the basis of newly discovered evidence under Fed. R. Crim. P. 33, a defendant must first show that the evidence was in fact discovered after trial and that it could not have been discovered beforehand in the exercise of reasonable diligence. Having surmounted that threshold obstacle, the defendant must in the ordinary case establish that the newly discovered evidence is of such probative significance that it probably would have produced an acquittal. But where the newly discovered evidence was in the

[5] Judge Leventhal filed a separate statement explaining his disagreement with the panel opinion and his reasons for voting against *en banc* reconsideration (Pet. App. D, pp. 22a-24a).

possession of the prosecutor before trial *and* he violated a duty to disclose its existence to the accused, a new trial may be awarded on a lesser showing of probable impact.

In the instant case, the court of appeals did not find that the prosecution had deliberately suppressed decedent's criminal record or that it had otherwise breached any duty of disclosure. The court nonetheless held that the mere post-trial discovery of this information in the government's files justified lowering the showing necessary to obtain a new trial. Applying that reduced standard—whether the evidence "might have" generated a reasonable doubt concerning respondent's guilt (Pet. App. A, p. 11a)—the court found that the prosecution's failure spontaneously to disclose Sewell's criminal record justified a new trial.

1. In so holding, the court of appeals entirely ignored uncontroverted evidence that the information held sufficient to entitle respondent to a new trial was in no proper sense newly discovered. Respondent's trial counsel admitted that he had been put on notice of the fact that Sewell probably had a criminal record during pretrial witness interviews. There seems little doubt that the defense could readily have obtained the particulars of those offenses—these were, after all, official records—by the simple expedient of asking the prosecutor for that information or by the submission of a properly directed subpoena. The matter was not pursued because counsel determined (not unreasonably, in our view) that the

evidence probably would be held inadmissible at trial. Under these circumstances, the inescapable conclusion is that the evidence was known to the defense prior to trial or, at the least, was discoverable in the exercise of due diligence. Accordingly, a new trial could not properly be granted on the basis of a tardy claim that the defense might have wished to utilize the evidence.

2. Even assuming that the court of appeals properly treated the evidence of Sewell's prior misdemeanor convictions as newly discovered, it applied the wrong standard in assessing the sufficiency of the evidence to support the award of a new trial. Its analysis entailed two fundamental errors: it improperly discounted the necessity for finding culpable prosecutorial misconduct as a predicate for departing from the normal Rule 33 standards for determining whether new evidence is weighty enough to require a new trial; and, if its decision is viewed as reflecting a finding of prosecutorial misconduct, that finding was erroneous because based upon a disregard of the principle that the prosecution's duty to disclose information normally is predicated upon the existence of a reasonably focused defense request for production of that information.

A. In the ordinary case, newly discovered evidence will justify a new trial only when it is concluded that the evidence is of such weight that it would probably produce an acquittal. This rather high standard, which has received virtually universal acceptance in the federal courts, reflects the accom-

modation that has been struck between the undeniably important interest of the criminal justice system that innocent persons not be convicted of crime and the weighty interest in preserving the finality of judgments reached after a fundamentally fair trial. It cannot seriously be contended that the evidence of Sewell's prior misdemeanor convictions comes near to meeting this standard.

The application of a more lenient standard for weighing newly discovered evidence cannot, in light of the foregoing, logically be based solely upon the supposed exculpatory potential of the evidence; it must, in other words, reflect policies other than the desire to guard against conviction of the innocent. In our view, the only proper occasion for departing from normal Rule 33 standards arises when it is shown that the prosecution has breached a duty of disclosure or otherwise engaged in material misconduct. In such an instance, greater liberality in passing upon new trial motions is supported both by the desire to erase what may properly be viewed as an unfair conviction and by the deterrent effect that award of a new trial will have upon possible future instances of prosecutorial misconduct. Neither of these salutary objectives could possibly be furthered, however, by the action of the court of appeals in this case, based as it was solely upon the possible utility of the evidence to the defense and the wholly fortuitous circumstance that the information was contained in the prosecutor's files.

B. The opinion of the court of appeals, while seemingly making no finding of prosecutorial misconduct, nevertheless (inconsistently, in our view) concludes that respondent was denied due process of law by the prosecution's nondisclosure of Sewell's prior criminal record. In so doing, it entirely discounted any need for the defense to make a meaningful request before or during trial in order to activate the prosecutor's disclosure obligations. The request requirement is, however, a central ingredient of this Court's previous formulations in *Brady* v. *Maryland*, 373 U.S. 83, and *Moore* v. *Illinois*, 408 U.S. 786, of the prosecutor's disclosure obligations, and we believe that considerations of sound policy and common sense counsel against discarding the requirement.

Ordinarily, as a criminal trial approaches, it is the defense rather than the prosecution that is in the best position to know what evidence the defense already possesses, what theory or theories the defense will rely upon at trial, and what kinds of information are likely to have material exculpatory potential. While the prosecution's files will contain many types of information garnered from various sources, the exculpatory value to the defense of various pieces of information will often not be apparent to the prosecutor in advance of trial, nor does he have any means of knowing what information in his files is not also in the possession of the defense. The submission of a reasonably focused and specific defense request, accordingly, serves to alert the

prosecutor to the potential importance to the defense of certain types of evidence and may properly form the basis for imposition of a duty on the prosecutor to review his files with care to see whether they contain information of the kind requested that appears to be favorable to the defendant and material to the outcome of the litigation.

By dispensing with the request requirement and considering only whether the prosecutor's files contain evidence that "might have" been useful to the defense, the approach of the court of appeals leaves the prosecution with virtually no safe alternative to throwing open its files to the defense prior to trial, a course that this Court indicated in *Moore*, *supra*, 408 U.S. at 795, is not required in our adversary system of criminal justice. Moreover, the approach creates what are likely to prove irresistible temptations to some defendants themselves to withhold some evidence at their first trial or not to pursue certain leads in the expectation that, should they be convicted, a second trial may readily be secured whenever the information in question was in the government's possession prior to trial.

3. Even if the court of appeals were correct in adopting a relaxed standard for assessing the sufficiency of the evidence to justify a new trial, its application of that standard to the facts of this case was erroneous. A new trial is never warranted unless it is shown that there is at least some reasonable likelihood that the nondisclosed evidence would have affected the jury's verdict. *Giglio* v. *United States*,

405 U.S. 150, 154. Here, even had the prosecution apprised defense counsel of the particulars of Sewell's criminal record, there is no reasonable likelihood that the jury might have returned a different verdict. In the first place, it seems clear that the defense would not have attempted to introduce the evidence. But even had the information been available to the jury, the two convictions for carrying a knife were merely cumulative of other evidence already before the jury, while the misdemeanor assault conviction was so remote in time (eight years previously) as to have little or no probative value. Moreover, to the extent Sewell's prior convictions showed a man well versed in handling himself with a knife, the evidence seems actually inconsistent with respondent's self-defense theory, since it is unlikely that she would have escaped from the altercation unscathed had Sewell initially attacked her.

ARGUMENT

I. SINCE RESPONDENT HAD KNOWLEDGE OF OR WAS ON NOTICE OF THE ESSENTIAL FACTS CONCERNING DECEDENT'S CRIMINAL RECORD, SHE WAS NOT ENTITLED TO A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE

To prevail on a Rule 33 motion for a new trial on the basis of *newly* discovered evidence, it is tautological that the defense must show that the evidence was discovered after trial. If the defendant knew of the evidence beforehand but chose not to introduce it for strategic reasons, he cannot later obtain a new trial

on the basis of that evidence. See, *e.g.*, *United States ex rel. Regina* v. *LaVallee*, 504 F. 2d 580, 583-584 (C.A. 2), certiorari denied, 420 U.S. 947. The defense also must show that the evidence could not, with the exercise of due diligence, have been discovered until after the trial. *United States* v. *Slutsky*, 514 F. 2d 1222, 1225 (C.A. 2); 2 Wright, *Federal Practice and Procedure, Criminal* § 557, p. 515 (1969 ed.). If the defense was on notice of the essential facts concerning exculpatory evidence before trial but elected not to investigate that information, that evidence is considered to have been in its effective possession. Its failure to utilize that information at trial therefore constitutes a lack of reasonable diligence and should defeat a Rule 33 motion based upon subsequent discovery of that evidence. See, *e.g.*, *United States* v. *Slutsky*, *supra*; *United States* v. *Ruggiero*, 472 F. 2d 599 (C.A. 2), certiorari denied, 412 U.S. 939; *United States* v. *Rachal*, 473 F. 2d 1338 (C.A. 5), certiorari denied, 412 U.S. 927.[6]

The requirements of "new" discovery and due diligence on the part of the defense should not be abandoned simply because the evidence happens to have been in the prosecution's possession prior to trial and the claim for a new trial is thus couched in

[6] Similarly, in considering a motion for discovery under Fed. R. Crim. P. 16(a)(1)(C), the court must consider the availability of the disputed material from other sources, including the defendant's own knowledge. *United States* v. *Ross*, 511 F.2d 757 (C.A. 5); see *United States* v. *Teague*, 445 F.2d 114 (C.A. 7) (*Brady* claim).

terms of the *Brady* doctrine. The prosecution's duty to disclose exculpatory evidence upon request under *Brady* applies only to information in the *exclusive* knowledge and possession of the prosecution. *United States* v. *Ruggiero*, *supra*; see *Giles* v. *Maryland*, 386 U.S. 66, 96 (White, J., concurring); *Levin* v. *Katzenbach*, 363 F. 2d 287, 292 (C.A. D.C.) (Burger, J., dissenting), remanded, 262 F. Supp. 951 (D. D.C.), reversed *sub nom. Levin* v. *Clark*, 408 F. 2d 1209 (C.A. D.C.). Once the accused has knowledge of potentially exculpatory evidence, nondisclosure of that evidence at trial is as much chargeable to the defense as to the prosecution, and it cannot then reasonably be said that the evidence was "suppressed" by the prosecution or that, except in the most extraordinary circumstances, a new trial is warranted. See *Williams* v. *United States*, 503 F. 2d 995 (C.A. 2); *United States* v. *Slutsky*, *supra*, 514 F. 2d at 1225; *Clarke* v. *Burke*, 440 F. 2d 853 (C.A. 7), certiorari denied, 404 U.S. 1039. Were the rule otherwise, the results would be intolerable. Defense counsel would be able to procure second trials for their clients by the simple expedient of withholding a piece of possibly exculpatory information at the first trial, or by failing to develop a pretrial lead in full, in the hope of establishing a nondisclosure claim by finding the same evidence in the prosecution's file after trial.

In the instant case, respondent's counsel learned in pretrial interviews that the decedent likely had had a criminal record. Counsel could easily have

obtained the particulars of that record by subpoena to the police department or through an appropriately drafted production request. If the defense is not thereby charged with actual knowledge of that information, its subsequent failure to obtain decedent's conviction record constituted a failure to exercise due diligence and therefore forecloses the awarding of a new trial based on this evidence under Rule 33. Conversely, since the defense was at least on notice of this evidence, the government's unprompted failure to disclose that criminal history could not have violated respondent's due process right to a fair trial. See *United States* v. *Ruggiero, supra;* see also *United States* v. *Bermudez*, C.A. 2, No. 75-1073, decided November 6, 1975, slip op. 457-458. Indeed, as we now show, there was no impropriety of any kind in the prosecution's failure to volunteer this information, and thus no basis, whether constitutionally derived or in the exercise of the courts' supervisory power, for the award of a new trial.

II. ABSENT A PRIOR PRODUCTION REQUEST, THE PROSECUTION'S FAILURE TO DISCLOSE DECEDENT'S CRIMINAL RECORD DID NOT CONSTITUTE A BREACH OF DUTY THAT DEPRIVED RESPONDENT OF A FAIR TRIAL

Assuming that respondent is able to overcome the threshhold problem that the evidence of Sewell's criminal history cannot fairly be characterized as "newly discovered," it then becomes necessary to select the appropriate standard for weighing such evidence to determine whether it warrants the award

of a new trial. Ordinarily, in the absence of a finding of some form of culpable prosecutorial nondisclosure, a Rule 33 motion for a new trial on the basis of newly discovered evidence will be granted only when it is concluded that the evidence in question would probably result in an acquittal.[7] Decedent's prior criminal record was of such insignificant evidentiary value that by no conceivable stretch of the imagination could that standard be satisfied under the circumstances of this case (see Part III, *infra*). Indeed, the court of appeals did not purport to rest its decision on the normal Rule 33 standard.[8] Rather, the court employed what appears to be the most generous possible standard that still takes any account of the materiality of the newly discovered evidence, *viz.*, whether the evidence " 'might have led the jury to entertain a reasonable doubt about [respondent's] guilt' " (Pet. App. A, p. 11a).

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[7] See, *e.g.*, *United States* v. *Clay*, 476 F.2d 1211, 1215 (C.A. 9); *United States* v. *Steel*, 458 F.2d 1164, 1167 (C.A. 10); *United States* v. *DeSapio*, 456 F.2d 644, 647 (C.A. 2); *United States* v. *Rodriguez*, 437 F.2d 940 (C.A. 5); *United States* v. *Overton*, 421 F.2d 277, 279 (C.A. 5); *Thompson* v. *United States*, 188 F.2d 652 (C.A. D.C.); 2 Wright, *Federal Practice and Procedure, Criminal* § 557, 189-190 p. 518 (1969 ed.).

[8] The district court concluded that the evidence here in question did not satisfy the normal Rule 33 standard (App. 189-190), and the court of appeals did not overturn that holding.